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# Fabulous law: legal fables

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# Fabulous law: legal fables

## Abstract

If fables are characterized as talking animals dispensing moral wisdom through allegory,<sup>1</sup> then the moral wisdom dispensed through the legal fable is inevitably understood to comprehend allegories relating to power, sovereignty and in/justice, as exemplified by La Fontaine's seventeenth-century fable "The Wolf and the Lamb,"<sup>2</sup> and its contemporary amplification by Derrida in *The Beast and the Sovereign*.<sup>3</sup> These exemplars animate law in the abstract, and through the form of the animated figures acting as proxies for law,<sup>4</sup> seem to bar the possibility that the fabular might also extend to the realities of law and its actors. This legal fable of power, sovereignty and in/justice reiterates through the force of its narrators; how Derrida construes La Fontaine, or at least how Derrida is understood to construe La Fontaine, forecloses other ways in which fables of the law might be seen to manifest themselves. In common law jurisdictions (England, Canada, the US, Australia and New Zealand), the realities of law and its manifestations function in the material and everyday, nesting within the decisions of the courts. These decisions and their associated reasoning becomes law, but the legal fable of La Fontaine or Derrida seems to say little about this kind of law.

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## Fabulous Law: Legal Fables

If fables are characterized as talking animals dispensing moral wisdom through allegory,<sup>1</sup> then the moral wisdom dispensed through the *legal* fable is inevitably understood to comprehend allegories relating to power, sovereignty and in/justice, as exemplified by La Fontaine's seventeenth-century fable "The Wolf and the Lamb,"<sup>2</sup> and its contemporary amplification by Derrida in *The Beast and the Sovereign*.<sup>3</sup> These exemplars animate law in the abstract, and through the form of the animated figures acting as *proxies* for law,<sup>4</sup> seem to bar the possibility that the fabular might also extend to the realities of law and its actors. This legal fable of power, sovereignty and in/justice reiterates through the force of its narrators; how Derrida construes La Fontaine, or at least how Derrida is understood to construe La Fontaine, forecloses other ways in which fables of the law might be seen to manifest themselves. In common law jurisdictions (England, Canada, the US, Australia and New Zealand), the realities of law and its manifestations function in the material and everyday, nesting within the decisions of the courts. These decisions and their associated reasoning *becomes* law, but the legal fable of la Fontaine or Derrida seems to say little about this kind of law.

Yet as this chapter reveals, we do a disservice to the *abstract* legal fable of story and moral of the kind retold through Derrida, if we imagine it as something apart from its own material conditions. Later in this collection, I turn to a decision of the highest court in the Australian legal hierarchy from the turn of the twentieth century, which continues to exert its force more than a century later, to illustrate just how law *fables*. This is an exemplary case;<sup>5</sup> its own *fabulous* en-

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1 Georges Van Den Abbeele, "Fable," *Historical Materialism* 16.4 (2008): 233–238.

2 Jean de la Fontaine (1621–1695), available at : <http://www.la-fontaine-ch-thierry.net/> (last access June 6, 2014).

3 Jacques Derrida, *The Beast and the Sovereign, Volume I*, ed. Michel Lisse, Marie-Louise Mallet and Ginette Michaud, trans. Geoffrey Bennington (Chicago: University of Chicago P, 2009). See also Jacques de Ville, "Deconstructing the Leviathan: Derrida's *The Beast and the Sovereign*," *Societies* 2 (2012): 357–371; Matthew Chrlew and Chris Danta, "Introduction – Fabled Thought: On Jacques Derrida's *The Beast & the Sovereign*," *SubStance* 43.2 (2014): 3–9. The fable itself originates much earlier through Aesop and other variations exist.

4 Chrlew and Danta, "Introduction," 4, raise the paradox of Derrida's real encounter with his pet cat, as opposed to the figure of cats in their fabular and allegorical form.

5 *Exemplarity and Singularity: Thinking Through Particulars in Philosophy, Literature and Law*, eds. Michèle Lowrie and Susanne Lüdemann (Oxford: Routledge, 2015), contains a range of es-

gement with the *fabular*, along with its contemporary *fabulization*, means that it is *fabled* in and by law. Though it speaks to the fable in its allegorical sense, complete with talking animals – and a fabulous creature – this is a fabulous case for other reasons entirely. It speaks to the common law’s practice of extracting law and legal principles from a vibrant and lived experience that is rendered a carapace, based on the premise that the principles contained in cases speak for themselves time out of mind. Decided in 1908, it is still good law in 2015 (having not been overturned by legislation or later judicial decisions), and it is read as if it were part of the here and now. Despite this, the case now stands only for principles supported by a bare and scant background known as the “facts” (the material circumstances which animate legal principles and thus the law), which are more or less unmoored in time and space, but which are taken to be interpretatively complete because they rely upon the rhetoric of reason and rationality – unpolluted by the seeming irrelevance of the narrative that nests within the text of the case. However, the “facts” are a necessary component and supplement to the common law’s interpretative requirements, yet this does not stop the law being fabled. For the continued presence of this exemplary case “raises and complicates questions of exemplarity, rhetoric, and power [...] exemplify [ing], as Louis Marin argues, the way in which narratives lay traps for readers. The simplicity of the fable masks and reveals the complex rhetorical operations of ‘*fabula*.’”<sup>6</sup>

This play of *fabula* is the jester’s trick. You might have noticed a surplus of fables so far in this introduction, denoted through the stylistic and typographical convention of the italic, a practice marking words as foreign.<sup>7</sup> Yet none of these *fables* are foreign, though all are *fabulous*. Even seemingly invented words are real. The derivation of the word is the key, because fables are nothing other than stories. And stories, for a rational world at least, are inherently untrustworthy, defined variously as a “fictitious narrative or statement; a story not founded on fact,”<sup>8</sup> which “speak falsely, talk falsehoods, lie,” that “fabricate, invent (an

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says reconsidering the role of the Roman exemplar and role of exemplarity in and around law against the post-Enlightenment negation of the exemplar in favour of the abstract.

<sup>6</sup> Marc Redfield, “Fables of Responsibility: Aberrations and Predicaments in Ethics and Politics (review),” *Modern Language Quarterly* 60. 2 (1999): 288–290, 288.

<sup>7</sup> The italic formed the typographical enigma used in *The Da Vinci Code case*, *Baignent & Leigh v The Random House Group Ltd* [2006] EWHC 719. As Peter Goodrich notes, the device was simply unobserved by those reading the case: Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (New York: Cambridge University P, 2014), 9–10.

<sup>8</sup> “Fable, n.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

incident, a personage, story, etc.).”<sup>9</sup> *Fabulousness* is defined to mean a “prone-ness to fiction or invention,” and thus includes a “foolish or ridiculous story; idle talk, nonsense.”<sup>10</sup> This word is unforgiving: “to take (something) for fable or to hold at fable,”<sup>11</sup> (from the Old French *tenir a fable*),<sup>12</sup> is to be gulled, or to be fooled. There is nothing *fabulous* about this state of affairs at all, for to be fabulous in this sense is “of a doctrine, error, or notion: Based on or originating in fable or fiction.”<sup>13</sup> We, too, are fabled, but not in a good sense. We are discombobulated, gulled, made foolish, exposed as making things up, *to be taken for fable*. To think of the fable as a negative is the very form of fable itself, through its etymology and morphology. We fable when we make things up, invent, when we are fooled and when we are foolish.

There are more, many more varieties of fable, but that is as good a place to stop as any, because we get the picture. We might not have meant to, but we have fabled the text if we interpolated the allegorical fable in the place of that other fable, the fable that is fiction and lie. Lawyers fable the law of the past through the common law’s privileging of abstraction as the basis of rational law, in the practices that assume that the imposition of rules and formal legal interpretative devices, such as the rules of statutory interpretation or *stare decisis*, act as bulwarks against the possibility of unreason or judicial inventiveness, or the possibility of fabling.<sup>14</sup> For these reasons, among many, law pays nearly no attention to its own historicization, its materialities, preferring to believe that the reduction of the narratives and circumstances into bare rules and principles achieves a formal legality. Law pays little or no attention to the possibility that those rules and principles might be affected by the loss of knowledge of narratives and circumstances, and paradoxically results in the formation of fabulous law. Nor do legal actors always realize that they, too, are historicized, and that they too will

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9 “Fable, v.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

10 “Fabulousness, n.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

11 “† Fabulousness, n.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

12 “† Fabulousness, n.” *OED Online*.

13 “Fabulous, adj.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

14 This needs to be distinguished (a favourite technique of the common law) from the inventive device known as the legal fiction used to achieve a particular legal result in a case. Legal fictions are not legal novels or law as fiction. For accounts of the theory and practice of the legal fiction, see the essays contained in *Legal Fictions in Theory and Practice*, eds. Maksymilian Del Mar and William Twining (Switzerland: Springer, 2015), generally.

inevitably fable law and the reading of cases by imposing the lens of the present onto the law of the past. The fabulous case to be considered later in this collection makes just this point.

## 1. Faire Savoir

The possibility that lawyers might fable because they are bound up in and through the world they inhabit (or that we might need to engage with worlds that have been lost), that is from *outside* and beyond the limits of law is both unthinkable and fabulous, as the *Oxford English Dictionary's* etymological examples of the word *fabulous* reveals. The *Dictionary* uses examples from two heroes of the common law, Hobbes (1588–1679) and Paine (1737–1809), to illustrate how that which is fabulous – superstition and irrationality – I is seemingly remedied by the forces of reason and rationality (and establishing fundamental, foundational stories of law along the way). So the *Dictionary* draws on Hobbes' *Leviathan*, published in 1651 in these terms: "T. Hobbes *Leviathan* iv. xlv. 334 Their *fabulous* Doctrine concerning Dæmons."<sup>15</sup> And nearly 150 years later, in 1794, the *Dictionary* illustrates the negative connotation through the title of Paine's: "The Age of Reason, being an investigation of true and of *fabulous* Theology."<sup>16</sup> Fabulous, yes, but these fabulous definitions could not be further from our present day conception of the word. For despite the traps and warnings already activated, if we hold onto the carapace of a word, we fable (in its negative sense) if we read these delightful sentences to invoke the fabulous of everyday parlance, to mean wonderful or marvellous or special, *à la* Ab-Fab, itself *Absolutely Fabulous*.<sup>17</sup> These are not wonderful doctrines, or marvellous theologies, but *fictitious, foolish, invented, anti-empiricist and anti-rational doctrines and theologies*. Law's faith in the anti-fabulous is, however, misplaced, because that which is seemingly rational and reasonable, removed of Dæmons and Theologies, is as capable of being as negatively fabulous as that which it overcame. QED; if lawyers do not look beyond what is assumed in the text of long-standing principles found in case law, then we fable the law in unexpected ways. Rationality and reason is no bulwark against fabulous readings of the texts of law through the unintentional agencies of law's actors.

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<sup>15</sup> The *Leviathan* is central to Derrida's argument: Derrida, *Beast and Sovereign*; de Ville, "Deconstructing the *Leviathan*"

<sup>16</sup> "Fabulous, adj." *OED Online*.

<sup>17</sup> *Absolutely Fabulous*, available at: [https://en.wikipedia.org/wiki/Absolutely\\_Fabulous](https://en.wikipedia.org/wiki/Absolutely_Fabulous) (last access February 15, 2015).

Derrida, too, understood the wont of fabulous fable, recognising and understanding that fables have multiple, perverse meanings, through the inversion involved in the construction of knowledge, and how it might be subverted or contorted through the process by which meaning is created. Derrida understood that fables make meaning through their *faire savoir*,<sup>18</sup> that is that they make, meaning, or as translated literally, “make to know.”<sup>19</sup> Derrida’s conception of the *faire savoir* is not unidimensional however, and needs to be understood in two different registers. The first of these is anodyne, the *faire savoir* as the didactic fable of the kind that reveals itself as the expected notion of fable as story, moral, parable.<sup>20</sup> The second form through which Derrida conceives of fable is through both a literal and a figurative shift of emphasis as the “*faire*” *savoir*, which is of a different order of fable entirely, involved in:

**“making like” knowledge** [*“faire” savoir*], i.e. giving the impression of knowing, giving the effect of knowledge, resembling knowing where there isn’t necessarily any knowing: in the latter case of *faire savoir*, giving the effect of knowing, the knowing is a pretend knowing, a false knowing, a simulacrum of knowing, a mask of knowing.<sup>21</sup> [my emphasis in bold]

This “making like” knowledge is the domain of the negative fable. While Derrida’s concerns about “*faire*” *savoir* sits within the domains of power, “*faire*” *savoir* is precisely the form in which law speaks when its actors fable, *making like knowledge*, as legal *fabulars*, “a narrator or recorder of tales or fictions,”<sup>22</sup> or *fabblers*, “one who speaks falsely, a liar (obs.),”<sup>23</sup> who *fabulates* and *fabulizes* by “inventing, concocting and fabricating.”<sup>24</sup> Of course, not all or even most, law is fabled, but that law *can* be fabled by *legal fab(u)la/e/rs* reveals that law is embodied, temporally and spatially grounded and actor dependent, for as Derrida observes, fables are nothing on their own:

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18 Drawing on Marin’s earlier exploration of the role of law and power through the fable: Louis Marin, *Food for Thought*, trans. Mette Hjort (Baltimore & London: The Johns Hopkins University Press, 1989), xviii.

19 Derrida, *Beast and Sovereign*, 33.

20 Derrida, *Beast and Sovereign*, 34.

21 Derrida, *Beast and Sovereign*, 35.

22 “† Fabular, n.” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

23 “† c. Fabler, n.” *OED Online*. (last access October 11, 2014).

24 “Fabulate, v.” 2. “To invent, concoct, fabricate;” “† Fabulize, v.” “To concoct, invent;” *OED Online*. Oxford University Press, October 2014. Web. (last access October 11, 2014).

What is fabulous in the fable does not only depend on its linguistic nature, on the fact that the fable is made up of words. The fabulous also engages act, gesture, action [...] in organizing, disposing discourse in such a way as to recount, to put living beings on stage, to accredit the interpretation of a narrative, to *faire savoir*, to make knowledge, to make performatively, to operate knowledge.<sup>25</sup>

Words do not act on their own, nor does law. Law's actors inevitably are involved in "making to know," but law's practice is such that it denies the possibility that law, with its techniques grounded in the assumptions that rationality and reason immunize law's actors from fabling, might result in "making like knowledge." Yet it is not hard to find the negative legal fable, the "*faire*" *savoir*, in action, if you know where to look, as the exemplary fabled case that I turn to later in the collection reveals how the legal actor "makes [law] like knowledge." To take us there, and to understand how abstract law needs material narrative, we need to step, briefly, back into the domain of that other type of fable, and what it reveals of the trap into which law's actors might fall, because of and not despite, the promise of reason and rationality.

## 2. The reason of the strongest is always best / *La raison du plus fort est toujours la meilleure*

To be *fabulose* is to be "fond of fables, myths, or enigmas."<sup>26</sup> If the traps placed for readers in this chapter so far have not done their job, there are more to follow, including what seems to be a *volte-face*, a turn to precisely the form of fable that appeared to have been eschewed, the legal fable of the type identified at the beginning of this chapter. The reason can only be revealed later, inevitably, through the kind of trap Marin identifies as the wont of the fable through the play of *fabula*.

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<sup>25</sup> Derrida, *Beast and Sovereign*, 35–36.

<sup>26</sup> "+ *fabulose*, adj." *OED Online*. Oxford University Press, October 2014. Web. 11 October 2014. (last access October 11, 2014). *Enigma* is defined as: 1a. A short composition in prose or verse, in which something is described by intentionally obscure metaphors, in order to afford an exercise for the ingenuity of the reader or hearer in guessing what is meant; a riddle; †1b. In wider sense: An obscure or allusive speech; a parable; 2. *fig.* Something as puzzling as an enigma; an unsolved problem is unlikely to be the form in which enigma is deployed in the definition of *fabulose*: "enigma, n." *OED Online*. Oxford University Press, June 2015. Web. (last access March 15, 2015).



The title of this sub-heading contains the first words and the moral of La Fontaine's fable, <sup>27</sup> "The Wolf and the Lamb,"<sup>28</sup> first published in 1668. This is the same fable referred to at the start of this chapter and though La Fontaine's is one of the best known versions, the fable has circulated since "Aesop."<sup>29</sup> Even if we know nothing of it, there is something about the title of the fable that gives us clues, the proximity of the words wolf and lamb speaking to an inevitability that is unlikely to refer to the promise that "The wolf also shall dwell with the lamb."<sup>30</sup> We are expected to know that something awful is most likely going to happen in the lines of this fable, but La Fontaine's opening words – *the reason of the strongest is always best* – appear at odds with a fable about animals whose likely end will result because of their relative inequities of power and strength. Wolves eat lambs, so the call to reason, and the coupling of reason with strength seems odd, but the words recall and echo those of a Latin version of the fable by the Anglo-Norman poet Walter, titled "De Lupo et Agno,"<sup>31</sup> whose "resigned moral [... says] 'Thus the harmful one hurts the harmless, and invents a reason for harming.'"<sup>32</sup> For as Shaw puts it: "In the final lines, the creatures' conflict is resolved as predictably and as unfairly as the opening moral leads us to expect."<sup>33</sup>

The opening words of La Fontaine's version of the fable have been called "bitterly ironic and stated *a priori*,"<sup>34</sup> as a denial of justice through power and force.<sup>35</sup> But Marin, using the "elaborately tuned instrument of both practical and theoretical reason" (invoked by the use of the word "reason" in the fable), reads these opening words as something else again, that its *grammar and logic* inevitably means that the reader has to accept their truth, that the *reason* of

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<sup>27</sup> Marin, *Food for Thought*, 55; as noted earlier, Derrida refers to Marin's chapter in his seminar: Derrida, *Beast and Sovereign*, 7–9. For a further on the ethico-political purpose of the fable: Thomas Keenan *Fables of Responsibility: Aberrations and Predicaments in Ethics and Politics* (Stanford: The Stanford University P, 1997), 43–47, 55–57.

<sup>28</sup> Derrida, *Beast and Sovereign*, 34

<sup>29</sup> c.620–c.564 B.C.E.; the fables entered into Europe through the prose versions of Phaedrus (first century C.E.), the Latin versifier of Aesop's fables which bears the name of Romulus.

<sup>30</sup> Isaiah 11:6 *King James Authorised Version*

<sup>31</sup> The Anglo-Norman Walter of England, c.1175.

<sup>32</sup> "Walter of England, 'De Lupo et Agno,'" in *The Fables of 'Walter of England'*, ed. Aaron E. Wright (Toronto, 1997): 26–28, 27 cited in Laura Wang, "Robert Henryson and the Animal in the Mirror," *Review of English Studies* 66 (2015): 20–39, 37.

<sup>33</sup> Mary Lewis Shaw, *The Cambridge Introduction to French Poetry* (Cambridge: Cambridge University Press, 2003), 55.

<sup>34</sup> Shaw, *French Poetry*, 54.

<sup>35</sup> Shaw, *French Poetry*, 55.

the strongest is best,<sup>36</sup> that the wolf exercises power precisely because it is the strongest,<sup>37</sup> and that strength comes about through law:

Violence will always lie at the origin of law; power will always be the basis of morality; and law and morality will never be anything but justifications of power. Unable to make justice strong, mankind ensured that power was made just [...] The discourses of the wolf and the lamb proves the truth of [the opening] words, while the story simply shows the saying's veracity.<sup>38</sup>

Marin's extension of the moral into this considerably widened reach can only be found by reading the fable through the insights of the contemporaneous text,<sup>39</sup> the 1662 *Logic of Port-Royal*.<sup>40</sup> Marin's reading is grounded both within the problems that the *Logic* sought to understand along with the critical dimension contained within the devices La Fontaine's deploys in the fable itself. The [originally anonymous] priestly authors of the *Logic* brought "the Augustinian tradition to its culmination within the Cartesian *épistémè*,"<sup>41</sup> bringing speculative knowledge into 'a doctrine of morals teaching the proper conduct of life and actions'.<sup>42</sup> The melding of two distinct discourses to form "a grammar and a logical system that is simultaneously an ethics and, vice versa, an ethics that is simultaneously a logical system and a grammar,"<sup>43</sup> the *Logic* brought "scientific knowledge and the moral knowledge within the same rational economy and method."<sup>44</sup> The logic of the *Logic* necessarily "involved the possibility of articulating a propositional logic of judgment together with a discursive ethics that would aim to regulate 'those erroneous readings that occur in civil life and ordinary speech'."<sup>45</sup>

Marin's starting point is that the fable problematizes questions of ethical virtue and moral obligation, including the obligation that the reader faces. He argues that by leaving readings open that include the possibility that power

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<sup>36</sup> Marin, *Food for Thought*, 70–81.

<sup>37</sup> Marin, *Food for Thought*, 63–65, 71.

<sup>38</sup> Marin, *Food for Thought*, 82.

<sup>39</sup> Marin, *Food for Thought*, 60.

<sup>40</sup> Published in editions between 1662–1683: Marin, *Food for Thought*, i; originally anonymously. The authors were later revealed as the theologian-philosophers Antoine Arnauld (1612–1694) and Pierre Nicole (1625–1695).

<sup>41</sup> Marin, *Food for Thought*, i.

<sup>42</sup> Marin, *Food for Thought*, 56.

<sup>43</sup> Marin, *Food for Thought*, 57.

<sup>44</sup> Claude Imbert, "Port-Royal et la géométrie des modalités subjectives," *Le Temps de la Réflexion* Gallimard n° 2 1982, 324, n 28, cited in Marin as "Port-Royal and the Geometry of Subjective Modalities," *Food for Thought*, 60.

<sup>45</sup> Marin, *Food for Thought*, 55–56.

can be moralized as a discourse of justice, or justice factualized as power, there is an inevitable pull on the part of the reader, who is caught by its opening call to reason, amplified by its insistence that it is the reason of the strongest that is “best”.<sup>46</sup>

Its theme is the conflict between fact and value, between an objectively established given and an ethical and ideal teleology. This is a conflict encountered by a moral subject, acting within the sphere of practical reason. It is a conflict that has to be worked out and resolved within the conduct of life.<sup>47</sup>

Through his intricate semiotic decoding of the fable, using the means and practices of the *Logic* and its associated grammar,<sup>48</sup> we understand that the talking animals, wolf and lamb, are cyphers: the wolf represents the state of nature, the little lamb civil society, culture, and law (as well as the inevitable representation of innocence and theological references that abound in the image of the lamb), that they are more than creatures of unequal strength and power.<sup>49</sup> The state of nature in the fable is a place of universal warfare “governed by brute facts and sheer power relations [...] a state of nature unrestricted by sanctions or obligations, a realm governed by the physical necessities of sheer power relations.”<sup>50</sup> It is inevitable that the little lamb, accidentally encountering the wolf, constructs cogent, reasoned arguments that she has done no wrong against him by drinking from a stream, but he asserts sovereignty and power over her nonetheless. Reason might be the best gesture through which to understand how to act, but it fails the lamb. The wolf makes a claim in property, and establishes a series of wrongs for which the lamb must take the blame,<sup>51</sup> despite being a new-born. The wolf dispatches her regardless: *Sans une autre forme de procès* (without

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<sup>46</sup> Marin, *Food for Thought*, 61.

<sup>47</sup> Marin, *Food for Thought*, 61.

<sup>48</sup> Marin, *Food for Thought*, 63–67.

<sup>49</sup> Marin, *Food for Thought*, 69–71.

<sup>50</sup> Marin, *Food for Thought*, 81. There is something of Hobbes’ state of nature here, but Marin reads the relationships theologically, that the wolf is authorized to act through a transcendent power, expiating its guilt in exercising power over the lamb: Marin, *Food for Thought*, 83. Hobbes and La Fontaine’s lives overlapped. Marc Fumaroli *Le poète et le roi: Jean de La Fontaine et son siècle* (Paris: Editions de Fallois, 1997), 69 observes that French writers of the seventeenth century were opposed to the political thought of Hobbes, Machiavelli and modern politics: cited in Katherine Ibbett, *The Style of the State in French Theater, 1630–1660: Neoclassicism and Government* (Surrey & Burlington: Ashgate, 2009), 17.

<sup>51</sup> Marin, *Food for Thought*, 83.

any (other) form of trial);<sup>52</sup> “cette expression remonte au XVI<sup>e</sup> siècle, où les condamnations à mort étaient légion, et qu’elles avaient lieu après une parodie de procès.”<sup>53</sup>

This reference to a show trial is a clue which reveals that something more is going on in this fable than can be explained through reason and logic, or the pull solely of a traducing of rationality and reason. Though not perhaps directly referencing the formal, political show trials of sixteenth-century France, we are left in no doubt that law has failed the lamb, and that it is the wolf’s claim to power through property that is the reason for this travesty of justice. What is not obvious, for those of us from another time and place, and for whom the image of the political show trial of the *ancien régime* and the themes of sovereignty, power and in/justice inherited through Derrida (and Marin), we find ourselves reading the fable through that filter, to the exclusion of a lost, though much richer, site of attack – that of everyday material law, the actions of property owners, and the role of lawyers.

For La Fontaine has larded the fable with local, everyday law, and its problems and injustices are encoded in its tropes and images and words and arguments, which is not altogether surprising because La Fontaine, the fabulist, was also a lawyer.<sup>54</sup> But of course, none of this is clear on its face. We need guidance to understand the fable in these terms, to read beyond abstract ideas of power and sovereignty and injustice to find the localized harms of law that have been lost from view. We fable La Fontaine’s barbs if we only read them as an account of abstract power, and through a material reading of the fable, through accounts of the operation of law and justice in seventeenth-century France, that we find that La Fontaine has a much smaller target at stake than

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<sup>52</sup> Carla Freccero, “A Race of Wolves” in *Animots: Post Animality in French Thought: Yale French Studies Number 127*, eds. Matthew Senior, David L. Clark, and Carla Freccero (Yale: Yale University Press, 2015): 110–123, 119–120.

<sup>53</sup> Colloquially “without further ado”; “the term dates to the sixteenth-century, where death sentences were legion, taking place after a show trial” [my translation] available at: <http://www.linternaute.com/expression/langue-francaise/14091/sans-autre-forme-de-proces/century> (last access June 6, 2015).

<sup>54</sup> A number of references indicate he was legally trained. “Entre 1645 et 1647, Jean de La Fontaine est à Paris où il étudie le droit [...] avec Maucroix et Antoine Furetière” – Between 1645–1647, Jean de La Fontaine was in Paris where he studied law with Maucroix and Antoine Furetière [my translation]: *Biographie de Jean de la Fontaine*, available at: <http://www.la-fontaine-ch-thierry.net/biographie.htm> (last access June 4, 2015). An English version says in 1646 “He is back in Paris with his friends Maucroix and Furetière and has begun to study law. He becomes a barrister in 1649,” available at: <http://www.musee-jean-de-la-fontaine.fr/jean-de-la-fontaine-page-uk-1-0-14.html> (last access June 4, 2015).

we realize. And that property owners, and lawyers who support those property owners, are the purveyors of profound, localized injustice – through manifestations of power.

David Parker describes the practices of law and justice in seventeenth-century France in these terms: “It would be difficult to find a more ingenious legitimization of the civil and legal inequalities inherent in the structures of the French state,”<sup>55</sup> than through the administration of law and justice, in particular through its operation at a local level. If anything manifested “social and civil inequality through legal privilege, [it was] best reflected perhaps in the idea that litigants ought to appear before their natural judges.”<sup>56</sup> A lamb *ought* to appear before the wolf, her natural judge, just as a tenant would be judged by their landowner, *their* natural judge, and so on, up the chain, a claim to jurisdiction over their dependents whether based in law or otherwise, that is through claims made in power alone, and not law Parker turns to Jean Bacquet’s 1688 *Traité des droits de justice, haute, moyenne et basse*,<sup>57</sup> along with other contemporary legal commentators, to paint a picture of the forms of localized power claimed by landowners in the century leading up to the French Revolution. It revealed that in the absence of formal legal bases for the invocation of jurisdictional claims by landowners over tenants, fictitious devices designed to claim jurisdiction were used as a matter of course. These were, in effect, actions outside law, and ranged from simply claiming the power to “institute a judge, a *procureur fiscal*, a clerk and sergeants,”<sup>58</sup> or by asserting that actions were “dominial,” such as imposing fines without appeal for non-payment of dues,<sup>59</sup> as an exercise of power absent law.

Even more striking is Parker’s observation that: “all [the contemporary] writers [...] agree that justice was a patrimonial right and could be bought and sold,”<sup>60</sup> and that despite the shift to a more centralized administration and rationalization of law during the seventeenth century, “the persistent perception of the interdependence of rights of property and those of justice was not diminished by the continual alienation of royal rights in both.”<sup>61</sup> Networks of privilege

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55 David Parker, “Sovereignty, Absolutism and the Function of the Law in Seventeenth-Century France,” *Past & Present for Thought* 122 (1989): 36–74, 49.

56 Parker, “Law in Seventeenth-Century France,” 49, also 55.

57 *Treatise on the Laws of Justice, High, Middle and Low* [my translation].

58 Parker, “Law in Seventeenth-Century France,” 50.

59 Parker, “Law in Seventeenth-Century France,” 51.

60 Parker, “Law in Seventeenth-Century France,” 51.

61 Parker, “Law in Seventeenth-Century France,” 51.

and connection resulted in the manipulation of the judicial system,<sup>62</sup> but in any case:

The jurists and legal practitioners of the day were more interested in the distribution, administration and execution of justice than in the enunciation of abstract principles about its source; when they did focus on this question, their frame of reference was a divinely ordained universe in which power, wealth and status were dispersed in hierarchical fashion.<sup>63</sup>

Knowing this, La Fontaine's fable can never look the same again. It is not simply or solely a disquisition on the operation of abstract ideals of justice levelled against an absolutist monarch, but a criticism of the operation of law at a local, material level. The lamb's fate speaks to and is directed towards forms and practices of localized injustice, the stuff of the everyday law under a judicial system grounded in power and privilege. The wolf's actions are no different to the kinds of behaviour of the landowners of seventeenth-century France, who assumed precisely this kind of wrenching power over their tenants, the wolves meting out injustice over their lambs.

The fable historicized reveals that whatever political concern animated La Fontaine, he was also attacking everyday legal practices based in and attaching to power that comes with property; his elegant alexandrines speaking to forms of elegant modes of law absent justice and thus enacting the expectations of the *Logic*, through the language of rationality and reason. In doing so, he was *thus speaking to his own propertied readers* who were themselves the self-same distributors of law without justice; we have to remember that fables were not the stuff of children's literature, but directed towards adults and their morality. In speaking to those who held property in the *ancien régime*, we see the fable directed towards something much more material and less abstract than we imagine of La Fontaine's barbs.

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<sup>62</sup> Parker, "Law in Seventeenth-Century France," 63.

<sup>63</sup> Parker, "Law in Seventeenth-Century France," 71.

### 3. “Thus the harmful one hurts the harmless, and invents a reason for harming.”

La Fontaine was continuing a tradition. Another earlier fabulist (who was also possibly a lawyer), the fifteenth-century Scottish poet Robert Henryson,<sup>64</sup> had said more-or-less the same thing to property owners and lawyers in a highly barbed gloss he appended to his version of the fable. He did not let the fable speak on its own, adding in clear words the moral of the fable (perhaps not trusting the fable to be interpreted by law’s interpreters), to make amply clear its message and its target. He spoke plainly and directly to lawyers, courts and the propertied, that is, to those who had the power to, and could, act against their tenants,<sup>65</sup> whose actions amounted to those of nothing other than those of the wolf against the lamb. Henryson chided them for pursuing those of unequal means for the smallest of breaches, and who used law not to achieve justice, but to extend and expand their wealth, using law to push their tenants out of their dwellings and land.<sup>66</sup>

Rather than making his point through the rationality of La Fontaine’s elegant alexandrines, Henryson uses verse to ensure that his coda reiterates the fable’s message. As Wang puts it: “Through deft handling of poetic style, Henryson achieves through pathos what might be impossible through logic alone: he moves readers to pity society’s lambs, despise its wolves, and envision social change [...]”:<sup>67</sup>

The poor folk, then, this Lamb may signify,  
Like cottars, pedlars, and such labouring men;  
Their life is half a purgatory aye,  
Even with honest work, as we well ken.  
The Wolf stands for extortioners, who then  
Oppress such poor folk, as we often see,  
By violence, or by guile and subtlety.

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<sup>64</sup> 1430?-1506?: Wang, “Robert Henryson.” For the fables in their original middle Scots, available at: <http://d.lib.rochester.edu/teams/text/kindrick-poems-of-robert-henryson-morall-fabillis> (last access June 3, 2015).

<sup>65</sup> MacQueen, John, *SCROLL: Scottish Cultural Review of Language and Literature, Volume 5, Complete and Full with Numbers: The Narrative Poetry of Robert Henryson (Scroll 5)* (Amsterdam: Editions Rodopi, 2006), 124–129.

<sup>66</sup> MacQueen, *Henryson*, 126.

<sup>67</sup> Wang, “Robert Henryson,” 36.

There are three Wolves which in this world now reign:  
 The first are those perverters of the Law,  
 Who, by their weasel words, their powers maintain,  
 And swear it's nothing but the truth on show;  
 But, for a bribe, the poor they'll overthrow,  
 Suppressing right, helping the wrong succeed;  
 Hell's fire awaits all such when they are dead.

O man of law, abandon subtlety,  
 Your crafty words, your plots so intricate;  
 Remember God, in His divinity,  
 Sees through the falsehoods you use in debate.  
 For gear or gold, for high or rich estate,  
 For causes false, make you no more defence;  
 Let justice reign; obey your conscience.<sup>68</sup>

We are left in no doubt about Henryson's message. He tells us plainly. What is obvious and clear in Henryson's version of the fable, however, is lost to the twentieth-first century reader in La Fontaine's highly stylized fable. We interpolate abstraction and grand notions of power, losing sight of the local and particular targets of injustice in his sights. For we engage in the "*faire*" *savoir* in reading La Fontaine's fable, projecting our assumptions about law into his text. This matters because La Fontaine's fable seems to speak to contemporary legal concepts, from rights of property to the language of contract and obligation,<sup>69</sup> but particularly because of its heavy reliance on reason, rationality and logic. However, these kinds of abstract principles were of little or no relevance to the lawyers of seventeenth-century France, as Parker shows, meaning we read something into the fable and the arguments of the anthropomorphized advocates, wolf and lamb, that simply are not there if we understand its target to (only) be that of a form of sovereignty and power. Reading La Fontaine's fable without the everyday of law which animates it means that we fable the fable, parlaying it into the twenty-first century with only a partial awareness of the injustices it seeks to expose.

This kind of legal fabling, in which law and its interpreters are actively engaged in the "*faire*" *savoir* confound law's assumption of rationality and reason. To fable in this way, it might be suggested, is a form of practice that might be excused by time and across space. But later in this collection, I turn to a fabled case decided some 200 years later where all manner of legal fablings persist, on the other side of the world and in a completely different legal system, in an unlikely twist.

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<sup>68</sup> Translation of Middle Scots, available at: <http://www.arts.gla.ac.uk/STELLA/STARN/poetry/HENRYSON/fables/lamb.htm> (last access June 3, 2015).

<sup>69</sup> Marin, *Food for Thought*, 71–77.